Office Supreme Court, U.S.
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No. 83-316

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

VITTORIO LEONE, RAMON MARTINEZ, ANTONIO PALOMBA, GIUSEPPI SANTANGELO, HEBER CABRERA SOSA, HUGO ARZUGA, RAUL G. LATORRE, DANIEL O. BARBOSA, CARLOS ALBERTO GIACOMINO, RADOLFA C. AGUIRE, HEBER WILSON CABRERA, ALMARO CARRATU, LEONCIO CARRASCO, GIUSEPPI ALLOTA and CARLOS OLIVERA, OMAR LEMES, MARIO ARESMONDI, MOISES WALTER CARRASCO and VINCENZO ABATE,

Petitioners,

—against—

COSMOPOLITAN SHIPPING CO., S.A., ETC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT, COSMOPOLITAN SHIPPING COMPANY S.A. IN OPPOSITION

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BRIEF OF RESPONDENT, COSMOPOLITAN SHIPPING COMPANY S.A. IN OPPOSITION

Response to Petitioners' Statement of Case

The petitioners' brief does not contain an accurate statement of the case and is misleading.

Contrary to statement of petitioners' counsel, the Order of U.S.D.J. Robert Carter filed on August 7 (20th page of Petitioner's unnumbered appendix), is clear and unequivocal. It was substantially ignored. Only four claimants were produced for deposition and physical examination by vessel owners counsel prior to trial, although the weeks of May 10 and May 17, 1982, had been set aside.

Contrary to statement of petitioners' counsel, the District Court and petitioners' counsel were advised that liability had been conceded by this respondent* on December 12, 1980 (4th page of Petitioner's unnumbered appendix).

On March 12, 1982 counsel for the parties were advised by the Court that the case would be brought on for trial late in May or early in June (5th page of Petitioner's unnumbered appendix). Counsel for petitioner had three months notice of the commencement of trial which is contrary to his Statement of the Case wherein he claims a lack of timely notice.

Response to Question 1 Presented by Petitioner

There has been no departure from the accepted and usual course of judicial proceedings on the part of the District Court herein.

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*Cosmopolitan Shipping Co., S.A. is a privately held corporation and has one wholly owned subsidiary. It is affiliated with Cosmopolitan Shipping Company, Inc.

Decisions of other Courts of Appeals are not in conflict with the decisions of the District Court and the Court of Appeals herein.

Each case is to be determined on its own merits and record. *Diapulse Corporation of America* v. *Curtis Publishing Co.*, 374 F.2d 442, 447 (2d Cir.). At times United States Courts of Appeals have determined that a District Court has abused its discretion but, such abuse of discretion does not exist herein.

The record, as reflected in the opinion of the District Court (U.S.D.J. Carter) and the record filed with the United States Court of Appeals, Second Circuit, clearly forms a basis for the procedure adopted by Judge Carter.

The review function of the Courts at Appellate level is succinctly stated in *Compagnie Des Bauxites De Guinea* v. *Ins. Co. of N. Am.*, 651 F.2d 877 at pages 884-885:

> "We will reverse a sanction imposed pursuant to Fed. R. Civ. P. 37(b)(2) only if the district court abused its discretion. • • •"
>
> "Case law instructs that the district court's decision must be rationally related to the reasons given and the requirements of the rule. We are aided here by the trial court's explanation of the factors that led to its decision. An appellate court is not free to substitute its judgment for that of the trial court, because the rules have invested the court of first instance with the expression of that judgment. The review function is not plenary; to disturb the exercise we must find an abuse of authority, not merely the presence of an alternative reasonable choice. • • •" (citations omitted)

This Court in *National Hockey League* v. *Met Hockey Club*, 427 U.S. 639 sets forth the standards to be applied:

"The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing. E.g., C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2284, p. 765 (1970); General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1211 (CA 8 1973); Baker v. F & F Investment, 470 F.2d 778, 781 (CA 2 1972). Certainly the findings contained in the memorandum opinion of the District Court quoted earlier in this opinion are fully supported by the record. * * *" (at page 642)

"But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. * * *" (at p. 643)

Again in *Link* v. *Wabash Railroad Co.*, 370 U.S. 626 at page 629, this Court affirmed that:

"The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted."

Response to Question 2 Presented by Petitioner

Question 2 as presented by petitioner is based on a false and misleading premise.

Although counsel were not advised of the precise date for commencement of trial until thirteen days prior thereto, the District Court had advised counsel for all parties on March 12, 1982 that trial would commence in late May or early June (5th page of Petitioner's unnumbered appendix). Petitioners' counsel had

sufficient knowledge of the imminence of trial to demand the setting aside of the weeks of May 10 and May 17, 1982 for the depositions of all parties represented by him (5th page of Petitioner's unnumbered appendix). As noted in Judge Carter's opinion, based upon the record before him, only four claimants appeared to be deposed and to submit to physical examinations, to the prejudice of respondent. The failure of the remaining petitioners to appear is to this day unexplained.

CONCLUSION

It is submitted that in the circumstances herein the granting of a writ of certiorari is not warranted.

Respectfully submitted,

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